In the Matter of:

CHARLES D. FERGUSON, **ARB CASE NO. 04-084**

COMPLAINANT, **ALJ CASE NO. 2004-AIR-5**

v. **DATE: December 29, 2005**

BOEING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:
N. Kay Bridger-Riley, Esq., Roy D. Tucker, Esq., *Bridger-Riley & Associates,* P.C.
Tulsa, Oklahoma

For Respondent:
Thomas A. Schweich, Esq., Stephen R. Snodgrass, Esq., *Bryan Cave LLP, St. Louis, Missouri*

FINAL DECISION AND ORDER

The Complainant, Charles Ferguson, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Boeing Company, terminated his employment because he engaged in protected activity under the whistleblower protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)[1]

[1] 49 U.S.C.A. § 42121 (West Supp. 2005). AIR 21's whistleblower provision prohibits air carriers, their contractors and subcontractors from retaliating against employees for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121. To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence

and its interpretive regulations.[2] A Department of Labor Administrative Law Judge decided that as a matter of law, Ferguson failed to timely file his complaint[3] and that the limitations period was not subject to equitable tolling.[4]

On appeal the Board must decide whether Ferguson has established that there are any material facts relevant to the issue whether he mistakenly filed the precise statutory claim in the wrong forum when he filed a "Fraud, Waste, and Abuse Complaint" with the Department of Defense pursuant to 10 U.S.C.A § 2409 (West 1998)[5] alleging, among other things, that a Boeing manager's fraud could put airmen's lives and others in jeopardy. We conclude that Ferguson's passing reference to putting lives in jeopardy is not sufficient, as a matter of law, to establish that his Waste Fraud and Abuse complaint filed, pursuant to 10 U.S.C.A § 2409, constituted the precise statutory claim (i.e. an AIR 21 claim) filed in the wrong forum. Ferguson has failed to establish that there are any material facts, that if proven would entitle him to invoke equitable tolling. Consequently,

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that he engaged in activity the statute protects, that the employer subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). The requirement that protected activity must have contributed to the employer's decision to take unfavorable action assumes that the employer knew about a complainant's protected activity. If the employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *Id.* at § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-3, slip op. at 22 (ARB Jan. 30, 2004).

[2] 29 C.F.R. Part 1979 (2005).

[3] Pursuant to 29 C.F.R. § 1979.103(d)

> Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

[4] Order Granting Respondent's Motion for Summary Judgment (ALJ Ord.) at 4.

[5] This provision affords government contractor employees protection from reprisal for disclosure of "information relating to a substantial violation of law related to a contract" to "a Member of Congress or an authorized official of an agency or the Department of Justice." 10 U.S.C.A § 2409(a).

Boeing is entitled to summary judgment on the grounds that Ferguson failed to file a timely AIR 21 complaint.

BACKGROUND

Ferguson worked as a sheet metal mechanic/inspector at McDonnell Douglas Helicopter Company, a Boeing subsidiary, at the Mesa, Arizona, Apache attack helicopter plant.[6] On or about April 20, 2002, Ferguson discovered that his supervisor, Doug Austin, had made an unauthorized modification to a part from an Apache helicopter.[7] He confronted Austin about the problem and when he was not satisfied with Austin's explanation, he filed a complaint with Boeing's Ethics hotline.[8] The hotline investigator instructed Ferguson to take his concerns to his supervisor, but because Austin was his supervisor, he spoke to the Program Director, Donnie McGlothlin, instead.[9]

On April 24, Austin held two meetings with members of his department to discuss the April 20th incident: he called an early morning meeting before Ferguson arrived at work and a second meeting later in the day that Ferguson attended.[10] Ferguson became convinced that Austin was harassing him for making his hotline complaint.[11] He contacted Boeing's EEO Officer, Miguel Gonzales, and requested him to investigate the situation.[12] Gonzales feared that there would be a violent confrontation between Ferguson and Austin, so he placed Ferguson on paid leave.[13]

On May 1, 2002, while still suspended, Ferguson filed a "Fraud, Waste, and Abuse Complaint" by e-mail with the Department of Defense Inspector General (DoD IG) "'regarding the fraud he felt Austin had perpetrated [by performing the unauthorized modification].'"[14] The complaint states:

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6 ALJ Ord. at 2.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

> Fraud, Waste and Abuse Complaint:
> Sir, I work at the Boeing-Mesa Facility in Arizona. I am a Sheetmetal mechanic\MSE II Inspector. I do actual modification on the AH64A Apache Helicopter. Approximately 2 weeks ago I personally caught a floor supervisor doing unauthorized and undocumented work to the forward wire cutter situated under the CPG floor. . . . In my opinion this supervisor is putting the airmen's lives and others in jeopardy. I have no idea what undocumented work was being ordered done by this supervisor but all undocumented work is fraud. This supervisor [sic] work in the past has been suspect and at some point someone will pay the cost of his actions. . . . right now I have been suspended because of what I have done. If there is anything that can be done to curtail this supervisor then someone needs to step up to the plate.[15]

On May 6, 2002, Ferguson met at the plant with an investigator and an attorney in regard to his hotline complaint.[16] Ferguson was told that he could not return to his job until his allegations were resolved.[17] On May 8, 2002, Ferguson filed another complaint by e-mail with the DoD IG alleging that he was afraid he was going to lose his job "'for notifying the DOD of possible fraud by an employee of a Government contractor[.]'"[18]

On May 9, 2002, Boeing terminated Ferguson's employment.[19] The termination memorandum stated that Boeing fired him because he struck a co-worker; made racially discriminatory statements to and about co-workers; made false, demeaning and possibly defamatory statements to and about co-workers; sought to intimidate or initiate a confrontation with a co-worker; made false statements about complaints to Ethics; verbally abused female vendor personnel; made demeaning or disrespectful statements about Boeing executives; and interfered with an EEO investigation.[20] The memorandum also stated that Ferguson had received verbal and written counseling during the past six

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15 Complainant Charles D. Ferguson's Combined Brief Showing Cause Why His Air 21 Complaint Should Not Be Dismissed as Untimely and Response to Respondent Boeing Company's Motion for Summary Judgment, (Comb. Br.) Exhibit B.

16 ALJ Ord. at 2.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

months regarding his workmanship, performance and communications and that "'the [EEO] investigation did not reveal harassment of or retaliation against you by your first-line managers.'"[21]

On August 11, 2002, Ferguson wrote again to the DoD hotline to find out the status of his complaint.[22] Ferguson stated in his communication to the hotline that Boeing terminated his employment because "I made the prepared, protected communication to the DOD IG Fraud, Waste and Abuse Hotline via email on May 1, 2002."[23] Ferguson next e-mailed Senator Inhofe of Oklahoma concerning his complaint that a Boeing employee performed unauthorized work on aircraft bound for the United Kingdom thus committing fraud against the United States.[24] Senator Inhofe referred Ferguson's letter to the Defense Contract Management Agency (DCMA), which administers the DoD contract with Boeing's Mesa, Arizona Apache helicopter plant.[25] DCMA responded to the Senator that Ferguson had filed a complaint or complaints about unauthorized work done at various times that led to two investigations.[26] These investigations revealed a single instance of unauthorized work for which the responsible employee was reprimanded.[27] The investigators found the remaining charges to be without merit.[28]

Ferguson subsequently wrote again to Senator Inhofe (and also to Senator McCain of Arizona).[29] He stated that he

> filed a complaint of fraud against The Boeing Co. and the DMCA found wrong doing on Boeing[']s part. Now comes the reprisal complaint that I filed. Boeing fired me within two weeks of my filing a "whistle blower", complaint. I filed a complaint of reprisal in June or July of last year and now I'm getting the feeling that my firing is going to get

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21 *Id.*

22 *Id*. at 3.

23 Comb. Br. Exhibit E.

24 ALJ Ord. at 3.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

> swept under the rug. . . . All I'm asking for is a little pressure, to make sure that someone doesn't turn a blind eye to what the Boeing Co did to me, my children and my career.[30]

Senator Inhofe's office forwarded this letter to the Occupational Safety and Health Administration (OSHA) on July 18, 2003.[31] On July 30, 2003, an OSHA Regional Supervisory Investigator wrote to Ferguson requesting additional information including "[i]dentification of the statute under which you are filing your complaint."[32] Ferguson responded by asking what statutes he had from which to choose.[33] The Investigator replied, "Your position description and employer would suggest an AIR21 application, but I cannot make a definitive judgment without more information."[34] Ferguson provided the requested information. In an e-mail to the Supervisory Investigator entitled "Complaint," Ferguson described the interactions with Austin that precipitated his May 1, 2002 Fraud, Waste and Abuse Complaint.[35] In particular he wrote:

> On or about April 24, 2002 Mr. Sheppard advised me that what Doug Austin did was a violation of company procedure. Added to that Doug Austin ordered another MSE II inspector to buy off the work order which technically constituted fraud against the U S Government. With all this in mind I called the company Ethics Hot line and discussed with them what I should do. . . . I believe that in June of 2002 I made complaint of reprisal against the Boeing Co. for terminating my employment for filing a complaint of Fraud naming Doug Austin as the violator of Military Contract, Federal law and Policy.[36]

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30 Comb. Br. Exhibit F.

31 ALJ Ord. at 3.

32 Comb. Br. Exhibit G.

33 *Id.*

34 *Id.*

35 This email was attached to the November 3, 2003 letter from the OSHA Deputy Regional Administrator to the Office of Administrative Law Judges notifying the Office that OSHA had denied Ferguson's AIR 21 complaint. ALJ Ord. at 3 n.2.

36 *Id.*

Ferguson's complaint contained no reference to aviation safety concerns and no indication that he ever brought any such safety concerns to the attention of his supervisors.[37]

The OSHA Deputy Regional Administrator recommended "that the complaint be dismissed with a non-merit finding."[38] Ferguson requested a hearing before a Department of Labor Administrative Law Judge.[39]

On January 30, 2004, the ALJ issued an Order to Show Cause and Cancelling Hearing.[40] He indicated that Boeing had filed two motions for summary judgment; one on the merits and the other contesting the timeliness of Ferguson's complaint.[41] The ALJ denied the motion to dismiss on the merits because he was not convinced that there were no material facts in dispute.[42]

Boeing, in support of its motion for summary judgment on timeliness, argued that Ferguson's complaint was not timely because he did not file it within ninety days of the date on which Boeing terminated Ferguson's employment.[43] The ALJ questioned whether equitable estoppel[44] could be applied to toll the limitations period because "it does not appear that the initial claim alleged violations of the whistleblower protection

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37 *Id.*

38 Secretary's Findings, Nov. 3, 2003.

39 *See* 29 C.F.R. § 1979.106(a).

40 Order to Show Cause and Cancelling Hearing (Show Cause Ord.) at 1.

41 *Id.*

42 *Id.*

43 29 C.F.R. § 1979.103(d). Boeing suspended Ferguson on April 24, 2002, and terminated his employment on May 9, 2002. Comb. Br. Exhibit A. Senator Inhofe did not forward the alleged complaint to OSHA until July 31, 2003. ALJ Ord. at 2.

44 The ALJ refers to the applicability of "collateral" estoppel several times in the Show Cause Order, but it is clear that the intended reference is to "equitable" estoppel or equitable tolling. *Compare* ALJ Ord. at 2 with ALJ Ord. at 3. Under principles of equitable tolling a limitations period may be tolled under three limited conditions: 1) if the respondent has actively misled the complainant concerning his cause of action, 2) if the complainant has been in some extraordinary way been prevented from asserting his rights, or 3) if the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 4 (ARB Aug. 31, 2005).

provisions of AIR 21,"[45] i.e., the complainant has not raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Accordingly, the ALJ ordered Ferguson to show cause why the ALJ should not recommend that his claim be dismissed as untimely.[46]

Ferguson responded to the Show Cause Order and Boeing replied to Ferguson's response. On April 5, 2004, the ALJ issued an Order Granting Respondent's Motion for Summary Judgment. The ALJ found that equitable[47] tolling was not applicable because Ferguson failed to establish that the third ground for tolling applied to this case, i.e., that he had filed the precise statutory claim, but had mistakenly done so in the wrong forum. [48] The ALJ wrote that as an initial matter for the ground to apply the initial complaint must have been filed in the wrong forum. [49] He concluded that such was not the case here:

> But the May 8, 2002 complaint was not filed in the wrong forum. Rather, the DoD IG was a proper forum for the complaint of retaliation due to whistleblowing, as the DoD IG took jurisdiction over the case and recently issued a decision denying the claim. . . . This is not a case where a complaint was filed in a forum where it was dismissed for lack of jurisdiction or improper venue. Instead, the complainant has had his claim adjudicated on the merits, and it was determined by the DoD IG that the complainant was disciplined for engaging in misconduct and violating Boeing's Expected Code of Conduct for its employees . . . , not for the complaints he made regarding his supervisor's actions. Since the initial complaint was filed in a proper forum, equitable estoppel is inapplicable.[[50]]

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45 Show Cause Ord. at 3.

46 *Id.* at 3-4.

47 Again, the ALJ's references to "collateral" estoppel rather than "equitable" estoppel or tolling were clearly unintentional. Compare ALJ Ord. at 3 with ALJ Ord. at 4.

48 ALJ Ord. at 4.

49 *Id.*

50 *Id*. (citations omitted). Although unnecessary to the resolution of the case, the ALJ also concluded that the complaint must be dismissed because neither the DoD IG nor the OSHA complaints plead violations of AIR 21. ALJ Ord. at 4. The ALJ considered the July 3, 2003 e-mail to Senator Inhofe and Ferguson's follow-up e-mail to the Supervisory Investigator on July 31, 2003, to comprise the OSHA complaints. *Id.* The ALJ concluded, "Neither of these documents mentions anything that could even remotely be construed to raise allegations falling under AIR 21. They do not mention safety or otherwise raise issues of relevance to air carriers. Instead, they allege that the complainant was terminated by

Ferguson filed a timely petition requesting the Board to review the ALJ's Order.[51]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under AIR 21.[52] The Board reviews an ALJ's recommended grant of summary decision de novo, and the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.[53] The standard for granting summary decision is essentially the same as the one in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.[54] Thus, the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[55] A "material fact" is one whose existence affects the outcome of the case.[56] And a "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence.[57]

Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[58] The non-moving party may not rest upon mere allegations, speculation, or denials in his pleadings,

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Respondent for reporting fraud." *Id.* Thus the ALJ reasoned that "even if the complaint was timely it would have to be dismissed."

[51] *See* 29 C.F.R. § 1979.110.

[52] Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 1979.110(a).

[53] *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

[54] *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

[55] 29 C.F.R. § 18.40(d).

[56] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[57] *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

[58] *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.[59] If the non-moving party fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[60]

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.[61]

DISCUSSION

The ninety-day limitation period for filing an AIR 21 complaint is not jurisdictional and may, therefore, be subject to equitable tolling.[62] But because Congress, not the courts or an administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be "scrupulously observed."[63] The ARB has recognized three situations in which it will accept an untimely petition[64] including when the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[65]

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[59] *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

[60] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[61] *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

[62] *Accord Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991)(Thirty-day statutory limitations period for filing a complaint under the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995), is not jurisdictional and therefore may be subject to equitable tolling); *School Dist. v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981)(same under whistleblower protection provision of an environmental statute).

[63] *School Dist. v. Marshall*, 657 F.2d 16 at 19.

[64] *See* n.14, *supra.*

[65] *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, 4-5, slip op. at 4 (ARB Aug. 31, 2000), *citing School Dist. v. Marshall*, 657 F.2d 16 at 20.

Ferguson bears the burden of justifying the application of equitable modification principles.[66] He argues that when he filed his May 1, 2002 complaint with the DoD IG, he filed the precise statutory claim in the wrong forum. Ferguson acknowledges that he did not know that he had a potential cause of action under AIR 21 until the OSHA Investigator so informed him on July 3, 2003.[67] So this was not a case in which a complainant intended to file an AIR 21 complaint, but instead of filing it with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resided (a correct forum), he filed it with Occupational Safety and Health Commission (an incorrect forum).[68] Instead, Ferguson argues that even though he did not intentionally file an AIR 21 complaint, his May 1, 2002 DoD hotline complaint was sufficient to raise a prima facie case under AIR 21 and thus he raised the precise statutory claim in the wrong forum. We do not find Ferguson's arguments to be persuasive.

Burnett v. New York Cent. RR Co.[69] is frequently cited for the proposition that a federal limitations period may be tolled if the precise statutory claim is filed in the wrong forum.[70] In *Burnett*, the plaintiff brought a timely action under the Federal Employer's Liability Act (FELA)[71] in a state court of competent jurisdiction and served the defendant with process. When the state court dismissed the action for improper venue, the plaintiff re-filed the same action in federal court, eight days prior to the date on which the time for appealing the state decision expired. The Court held that the limitations period for filing the FELA action was tolled and the action was considered timely. The Court acknowledged that statutes of limitations

> "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on

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66 *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

67 Initial Brief of Complainant Charles D. Ferguson (Compl. Int. Br.) at 6.

68 *See* 29 C.F.R. § 1979.103(c).

69 380 U.S. 424 (1965).

70 *See e.g., Electrical, Radio & Mach. Workers v. v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975); *School Dist. v. Marshall*, 657 F.2d 16 at 20.

71 45 U.S.C.A. § 51 (West 1986).

> notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[72]

But the Court reasoned that while statutes of limitations are primarily intended to assure fairness to defendants by preventing them from being surprised by the revival of stale claims, in this case, "Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue."[73] Thus in *Burnett*, the plaintiff filed the precise statutory claim, i.e., a FELA claim, in both the state court, the wrong forum, and the federal court, the correct forum.

In *Johnson v. Roadway Express, Inc.*,[74] the plaintiff relied on *Burnett* in support of his argument that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission pursuant to the equal opportunity provisions of the Civil Rights Act of 1964[75] tolled the limitations period applicable to an action under the Civil Rights Act of 1866[76].[77] In rejecting this reliance as not "helpful," the Court initially noted that Section 1981 is not coextensive in its coverage with Title VII and that the "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[78] The Court wrote

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in American Pipe [79] and Burnett depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case

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72 380 U.S. at 429, *quoting Order of RR Telegraphers v. Railway Express Agency, Inc*, 321 U.S. 342, 348-349 (1944).

73 *Id.* at 429-430.

74 421 U.S. 454, 466 (May 19, 1975).

75 42 U.S.C.A. § 2000e-5 (West 2003).

76 42 U.S.C.A. § 1981 (West 2003).

77 421 U.S. at 466.

78 *Id.* at 460, 461, 466.

79 414 U.S. 538 (1974).

> necessarily operated to avoid the evil against which the statute of limitations was designed to protect.[80]

The Court acknowledged the petitioner's argument that the timely filing of the EEOC charge adequately notified the employer that he was asserting a discrimination claim and permitted the employer to protect itself against a stale claim.[81] But the Court ultimately concluded, "[o]nly where there is complete identify of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period."[82] Accordingly the Court held that the filing of the EEOC complaint did not toll the limitations period for filing an action based on the same facts under the Civil Rights Act of 1866.[83]

We conclude that the uncontested facts of this case are more nearly aligned with *Johnson* than *Burnett.* In *Burnett* both claims were unequivocally and intentionally filed under precisely the same statute, the FELA. Here, Ferguson admits that he did not file his hotline complaint under AIR 21 because he was not even aware of its existence until the Supervisory Investigator informed him of it more than a year after he had filed his hotline complaint. Furthermore, Ferguson has conceded that the causes of action were separate and not identical.[84]

The application of the *Johnson* holding to the facts of this case is consistent with precedent established by the Secretary of Labor. In *Lewis v. McKenzie Tank Lines, Inc.*,[85] the Secretary considered the applicability of the wrong forum ground for tolling in a case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).[86] The complainant had filed a timely charge of discrimination with the EEOC in which he claimed that his employer had

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80 421 U.S. at 467.

81 *Id*. at 467 n.14.

82 *Id*. at 467 (citation omitted).

83 *Id*. at 467.

84 Compl. Int. Br. at 13-14 ("On the first complaint AIR 21 was violated and OSHA would have had the authority to investigate due to employer information relating to retaliation, i.e. Complainant's report to Boeing Ethics and concurrently, the DOD would have had authority to investigate **only** the complaint of Fraud against the government. It is not clear from DOD's letter that they separated the two actions.")(emphasis added).

85 No. 92-STA-20 (Nov. 24, 1992).

86 49 U.S.C.A. § 31105 (West 1997).

violated the Age Discrimination in Employment Act[87] by firing him for a safety-related refusal to drive. Even though the complainant's EEOC complaint referenced a protected activity, a safety-related refusal to drive, and an adverse action, termination of the complainant's employment, the Secretary held that "[t]he EEOC complaint was not asserted under the STAA and thus did not involve the precise claim mistakenly raised in the wrong forum."[88]

As a matter of law, we conclude that Boeing is entitled to summary judgment because Ferguson's "Fraud, Waste and Abuse Complaint" to the DOD hotline, in which he refers to "putting the airmen's lives and others in jeopardy" and the fact that his employer suspended him was insufficient to put Boeing on notice that Ferguson was asserting a claim of whistleblower discrimination against it under AIR 21. Therefore, Ferguson is not entitled to equitable tolling because he did not assert the precise statutory claim in the wrong forum. Consequently, we **DISMISS** his complaint as untimely.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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87 29 U.S.C.A. § 621 (West 1999).

88 No. 92-STA-20, slip op. at 3-4.